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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ZACHERY V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ZACHERY V., Defendant and Appellant.	F077407 (Super. Ct. No. 18CE600102-1) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Mary Dolas, Judge.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Smith, J. and Meehan, J.

INTRODUCTION

It was found true that appellant Zachery V. made a criminal threat in violation of Penal Code[1] section 422. Zachery contends the evidence is insufficient to sustain the true finding. He also contends the matter should be remanded for the juvenile court to expressly declare whether the offense is a misdemeanor or felony pursuant to Welfare and Institutions Code section 702. We sustain the true finding, but remand for a determination of whether the offense is a felony or misdemeanor.

FACTUAL AND PROCEDURAL SUMMARY

The Fresno County District Attorney's Office filed a Welfare and Institutions Code section 602, subdivision (a) petition against Zachery alleging he had made a criminal threat in violation of section 422. The petition described the offense as a felony.

At the adjudication hearing, Victoria G. testified that she was at her high school the morning of February 28, 2018. She arrived early to one of her classes; the substitute teacher was in the classroom. Victoria and Zachery walked into the classroom at the same time and sat down in their assigned seats. Zachery's seat was next to Victoria's.

After sitting down, Zachery told Victoria he was "planning to shoot up the school, that he wanted to take a gun to school that morning." Victoria described Zachery as "very serious" when he made the statement, testifying he did not have a smile on his face and there was an "emptiness" in his eyes. Victoria believed him to be serious and was "scared."

Victoria turned away from Zachery after he made the statement about shooting up the school. She believed he was going to follow through on his threat but did not believe he was going to take any action that day. She told another classmate about the threat a few minutes later.

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1 References to code sections are to the Penal Code unless otherwise specified.

That evening, Victoria told her mother about Zachery's threat. Her mother told her to report it. Victoria reported it early the next morning to the vice-principal via an email. Victoria still was scared the next morning. Victoria had heard about other school shootings and felt Zachery "could do it and it could happen anywhere."

On cross-examination, Victoria was asked if she "might have told" the investigating officer that Zachery said, "I was going to bring a gun to school today and shoot up the school." Victoria responded, "Yes." On redirect, Victoria was asked, "just to clarify. Um, what was the statement that Zachery made to you that morning in class." Victoria responded, "Something along the lines of bringing a gun to school and shooting up the school."

Sheriff's Deputy Larry Soto received a call for service to the high school campus "regarding a possible threat that was made." Soto spoke with Zachery regarding a "possible threat." Zachery admitted stating he was going to bring a gun to school but initially denied saying he was going to shoot up the school. Zachery acknowledged he was in trouble and stated it was "Because I said I was going to bring a gun to school and shoot up the school."

Zachery appeared "mad" when speaking with Soto and was glaring at him. Zachery told Soto his father owned three firearms and he had gone shooting at a gun range with his father. Soto also spoke with two vice-principals at the high school and interviewed Victoria.

Deputy Sheriff Oscar Rivas inspected the homes of Zachery's father and grandfather for weapons. The grandfather had two guns in a bedroom; he did not have gunlocks to secure the guns. Zachery's father had three guns in an unsecured closet; none of the guns were secured with gunlocks when the deputy inspected them.

The juvenile court found the People had "[established] beyond a reasonable doubt that the charge in the petition is true." A disposition hearing was scheduled.

At the April 19, 2018, disposition hearing, the juvenile court declared Zachery a ward of the court, placed him under the supervision of the probation department, and released him to the custody of his father. Credit of 40 days was awarded against a maximum period of confinement of three years. Zachery was ordered to undergo a psychological evaluation and to perform 100 hours of community service. Zachery was ordered to obey the probation conditions set forth in the disposition order.

Zachery filed a timely notice of appeal.

DISCUSSION

Zachery contends the evidence is insufficient to sustain the true finding that he committed a violation of section 422. He also contends the juvenile court failed to determine whether the offense is a felony or misdemeanor and the matter must be remanded for a determination.

I. Sufficiency of the Evidence

Zachery contends his statement was not intended as a threat; the statement lacked immediacy; and the statement did not cause Victoria to be in sustained fear. We disagree.

Standard of Review

In addressing the sufficiency of the evidence supporting a conviction, an appellate court "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] … ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. " ' " (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054.)

Analysis

Section 422 provides in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement … is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat …."

To establish a violation of section 422, five elements must be proven: (1) the defendant threatened to unlawfully kill or cause great bodily harm to the victim; (2) the threat was made with the specific intent that the statement be taken as a threat; (3) the threat was so unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the victim to be in sustained fear for his or her safety; and (5) the victim's fear was reasonable under the circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 630.)

Intended as a Threat

Zachery's contention that he did not intend his statement to be taken as a threat is implausible. The meaning of a threat must be gleaned from all the surrounding circumstances. (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218.) The parties' history can also be considered as one of the relevant circumstances. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340–1341.) The statute does not concentrate on the precise words of the threat, but whether the threat communicates a gravity of purpose. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1158.) Whether Zachery actually intended to carry out the threat is irrelevant to whether the statement violates section 422. (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.)

Zachery made the statement to Victoria that he intended to bring a gun to school and shoot up the school. Victoria described Zachery as "very serious" when he made the

statement, testifying he did not have a smile on his face and there was an "emptiness" in his eyes. Zachery never followed up this statement by telling Victoria he was joking or was not serious.

The case of *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*) does not support Zachery's contention. In *Ricky T.*, the minor stated, "I'm going to get you" and "I'm going to kick your ass" to his teacher. (*Id.* at pp. 1135–1136.) The appellate court looked at the context in which the threat was made and found a "lack of surrounding circumstances information" and concluded the statement was a "vague threat of retaliation." (*Id.* at pp. 1137–1138.)

The threat in *Ricky T.* was not a clear threat to cause death or great bodily injury. Zachery's statement, considered in the context and circumstances in which it was made, clearly conveyed an intent to cause death or great bodily injury by using a gun to shoot up the school. The record contains sufficient evidence from which a reasonable trier of fact could find Zachery's statement was an unequivocal threat of death or great bodily injury, even if the statement is viewed as an ambiguous statement, as Zachery urges. (*People v. Butler* (2000) 85 Cal.App.4th 745, 753–754.)

Immediacy

As for Zachery's contention that the threat lacked immediacy because it did not convey an immediate prospect of execution, he is incorrect. For a threat to be immediate, it does not require an immediate ability to carry out the threat. (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679–680.) A conviction for violating section 422 may be predicated upon a " 'conditional threat contingent on an act highly likely to occur.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 338–340.)

Zachery admitted saying he was going to bring a gun to school. That Zachery's threat was predicated upon a condition—that he bring a gun to school—does not preclude the threat from constituting a violation of section 422. Both Zachery's father and grandfather owned guns that were not secured with gunlocks and would have been

readily accessible to Zachery. Section 422 does not require an immediate ability to carry out the threat. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 816.)

There is no timeline on when a specific threat must be executed in order to satisfy section 422. (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 816.) The word "immediate" means "that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out, should the conditions be met." (*Ibid.*, citing *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538.)

Victoria understood Zachery to be serious about carrying out his threat and was scared. Circumstances established that Zachery had ready access to the means with which to carry out his threat, namely, the unsecured guns owned by his father and grandfather. The context in which the threat was made, and the circumstances conveyed a gravity of purpose and immediate prospect of execution to the victim. (*People v. Bolin*, *supra*, 18 Cal.4th 297 at pp. 339–340.)

Sustained Fear

Victoria testified she was "scared" when Zachery made the threat; she was still scared when she reported the threat to the vice-principal the next morning. This is more than sufficient evidence to establish the sustained fear element of section 422. Sustained fear, for purposes of section 422, need only extend beyond what is fleeting or transitory. (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.)

The evidence is sufficient to sustain the true finding for a violation of section 422.

II. Felony or Misdemeanor Determination

Zachery contends the case must be remanded to the juvenile court for a determination of whether his offense is a felony or misdemeanor. The People concede the case should be remanded.

A violation of section 422 is an offense that may be punished either as a felony or a misdemeanor. (§ 17, subd. (a); § 422, subd. (a).) Welfare and Institutions Code section 702 provides in relevant part, "[i]f the minor is found to have committed an

offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

The juvenile wardship petition identified the offense as a felony. At disposition, the juvenile court set a maximum period of confinement of three years. The three-year term indicates the juvenile court was treating the offense as a felony. (§ 18, subd. (a); § 422, subd. (a).) However, no express declaration was made, and the record does not indicate the juvenile court considered whether to declare the offense a felony or misdemeanor. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1207–1209.)

Accordingly, the matter must be remanded "for an express declaration pursuant to Welfare and Institutions Code section 702 and possible recalculation of the maximum period of confinement." (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1211.)

DISPOSITION

The matter is remanded to the juvenile court for an express declaration pursuant to Welfare and Institutions Code section 702 whether the Penal Code section 422 offense is a misdemeanor or felony and, if declared a misdemeanor, recalculation of the maximum period of confinement. In all other respects, the disposition order is affirmed.